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No. 20416

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

Dragor Shipping Corporation,
formerly Ward Industries Corporation,
Appellant,

vs.

Union Tank Car Company, a corporation,
Appellee.

BRIEF OF APPELLEE
UNION TANK CAR COMPANY

Upon Appeal from the District Court of the United States
for the District of Arizona

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SUBJECT INDEX

Statement of Facts 2

Argument 8

I. The Arizona District Court had jurisdiction over the person of Dragor and also over the subject matter of this action 8

A. Jurisdiction over the person of Dragor was secured pursuant to FRCP Rule 4(D)(3) and Arizona Revised Statutes, §10-481 11

B. Jurisdiction over the person of Dragor was also obtained purusant to FRCP Rule 4(D)(7) and Arizona Statutes and Rules 20

Conclusion 24

Certificate 25

Appendix A 26

Appendix B 27

Authorities Cited

Arizona Barite Co. v. Western Knapp Engineering Co., 170 F.2d 684 (C.A. 9, 1948) 21-22-23

Boas and Associates v. Vernier, 257 N.Y.S.2d 487 15-16

Cano v. Arizona Frozen Products, 38 Ariz. 404, 300 Pac. 953 10

Cohen v. Industrial Finance Corp., 44 F.Supp. 489 (S.D.N.Y., 1941) 13

Electrical Equipment Co. v. Hamm, 217 F.2d 656 (1954) 22

Ex Parte Schollenberger, 96 U.S. 369, 24 L.Ed. 853, (1878) 11

Gargac v. Smith-Rowland Co., 170 F.2d 177 (C.A. 7, 1948) 15

Gibbons & Reed v. Standard Accident Insurance Co., 191 F.Supp. 174 (D.C.Utah, 1962) 23

Giusti v. Pyrotechnic Industries, 156 F.2d 351 (C.A. 9, 1946) 13

Hanson v. Denckla, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 19

Houston Fearless Corporation v. Teter, 318 F.2d 822 (C.A. 10, 1963) 12

International Shoe v. State of Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 17-23

Ives v. G. R. Kinney Corporation, 149 F.Supp. 710, 712 13

Kourkene v. American BBR, Inc., 313 F.2d 769 23

Longines-Wittnauer Co. v. Barnes Reinecke, 261 N.Y.S.2d 8, 22, 209 N.E.2d 80 17

L. D. Reeder Construction of Arizona v. Higgins Industries, 265 F.2d 768 18-23

McGee v. International Ins. Co., 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 18

Mechanical Contractors Association v. Mechanical Contractors A. of N. Cal., 342 F.2d 393, 398 C.A. 9, 1965) 18
Mississippi Public Corp. v. Murphree, 326 U.S. 432, 90 L.Ed. 185, 66 S.Ct. 242 (1945) 11
Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 84 L.Ed. 167, 60 S.Ct. 153 (1939) 12
Oklahoma Packing Co. v. Oklahoma G & E Co., 309 U.S. 4, 84 L.Ed. 537, 60 S.Ct 215 (1939) .. 11
Pacheco v. Delgardo, 46 Ariz. 401, 52 Pac. 7479 .. 10
Singer v. Walker, 261 N.Y.S.2d 8, 24, 209 N.E.2d 80 17
Washington ex rel Bond & G. & T. v. Superior Court, 289 U.S. 361, 77 L. Ed. 1256, 53 S.Ct. 624 (1932) 12

Statutes:

28 U.S.C.A., §1404(a) 3
A.R.S. §10-481 5-10-12-21
A.R.S. §10-484.01(a) 21
A.R.S. §10-484.01(b) 8-21
§302 New York Civil Practice Act (CPLR) .. 16
Arizona Constitution, Art 14, §§5 and 8 20

Texts:

Fletcher Encyclopedia Corporations, §§8676, 8677 13

Rules:

F.R.C.P., Rule 4(d)(3) 11-20
F.R.C.P., Rule 4(d)(7) 20-21
F.R.C.P., Rule 4(d)(10) 20

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Appellee.

BRIEF OF APPELLEE
UNION TANK CAR COMPANY

Statement of Facts

The Statement of the Case in Appellant's brief omits important facts and is so disjointed and misleading that it is impossible to properly present the issues in this case without completely restating the facts.

The instant case grew out of the financial debacle created when the Appellant Dragor Shipping Corporation (formerly Ward Industries Corporation) and its joint venturer Idaho-Maryland Industries, Inc., defaulted in performance of their $7,800,000 second-tier subcontract with Union, the Appellee, on the Davis-Monthan Missile Launch project near Tucson, Arizona (R. 40).

The facts upon which the court below found that it had personal jurisdiction over the appellant were

established by affidavits, exhibits and court records in this and related judicial proceedings of which the District Court could take judicial notice (R. 40). These facts are summarized below:

Dragor, a Delaware corporation, obtained a certificate of authority from the Arizona Corporation Commission to transact business within the State of Arizona on July 29, 1947 (R. 40). For a period of 17 years it maintained that license in full force and effect and did not seek to withdraw from Arizona until six months after executing the promissory note upon which this suit is brought. At all times material to this case, Dragor had designated the C. T. Corporation at Phoenix, Arizona (R. 41) as its statutory agent upon whom notices and process might be served as provided for by Arizona Revised Statutes §10-481.

Dragor, then known as Ward Industries Corporation, while licensed to transact business in Arizona, formed a joint venture with Idaho-Maryland Industries, Inc., (IMI) a California construction company, which joint venture, in the summer of 1961, entered into a second-tier subcontract with Union for the performance of work at the U. S. Missile Launch Facilities, near Tucson, Arizona (R. 5). The agreed price to be paid by Union to the said joint-venture for performance of the work specified under the subcontract was $7,791,000 (R. 41).

In December, 1961, IMI, the managing partner of the joint venture, could not pay labor and material creditors in connection with performance of the aforesaid joint-venture subcontract work. On February 2, 1962, IMI filed a petition under Chapter XI of the Federal Bankruptcy Act (R. 5) in the United States District Court for the Southern District of California,

Central Division (No. 137,024-W.B.). After the filing of those proceedings, Dragor and the joint venture failed to complete the subcontract with Appellee Union (R. 5), and Union was forced to complete the same at a cost of approximately $9,000,000 in excess of the subcontract price (R. 41).

In May, 1962, Union filed a diversity action in the United States District Court for the Northern District of Illinois, Eastern Division, against Dragor to recover the losses it sustained by reason of the aforesaid default of the joint-venture. Dragor entered a general appearance in the action and moved to transfer it to the United States District Court for the District of Arizona pursuant to 28 U.S.C., §1404(a), (R. 43), on the ground that all matters involved in the action originated in the State of Arizona which was the appropriate forum for conducting the litigation (R. 41).

It appears from the records of the court below, of which that court and this Court of Appeals have judicial notice, that Dragor's then president Gammeltoft stated under oath in support of Dragor's motion to transfer, in part as follows (R. 43):

> "It is clear that Illinois has no connection with this litigation. The project, the witnesses and the documents are in Arizona. The contracts in suit were signed by the defendant in New York. The defendant carries on no business in the State of Illinois and does not maintain an office force. This court does not and cannot obtain jurisdiction over IMI, without which there will be mere circuity of litigation. *In this connection all three parties are subject to the jurisdiction of the Arizona District Court in Tucson, Arizona* * * *." (Emphasis supplied).

On the strength of this affidavit, the case was thereupon transferred to the United States District

Court for the District of Arizona at Tucson, Arizona (Union Tank Car Company v. Ward Industries Corporation, Civ. 1482-Tuc.) (R. 43). While the file in Civ. 1482 was en route to Arizona, Dragor instituted a separate and independent action (R. 42) against Union in the same court,[1] seeking rescission of the subcontract with Union and money damages (*Ward Industries Corporation v. Union Tank Car Company*, Civ. 1478-Tuc.)

Extensive pretrial proceedings were subsequently conducted by the parties before the Honorable James A. Walsh, Judge of the court below. On October 3, 1963, just prior to the trial date of the above actions, the parties entered into an Agreement of Settlement under the terms of which Dragor agreed to pay Union the sum of $1,000,000, to be evidenced by a promissory note due September 30, 1964, with interest at the rate of 5% per annum to maturity and 7% thereafter (R. 42). The agreement provided for the exchange of releases of their respective claims in the Tucson litigation and was to be performed in part at Tucson, Arizona, by appearances before the District Court in Tucson to dismiss with prejudice the respective actions then pending in the Tucson District Court. The delivery of the aforesaid promissory note for $1,000,000 was conditioned upon the dismissal by the parties of said suits and upon execution of the settlement agreement (R. 5, 8). Thereafter the parties, by their respective counsel, did appear before Judge Walsh and obtained a dismissal with prejudice of both proceedings.

At the time these acts were performed in Arizona, on the strength of which it obtained the dismissal

[1] Compare appellant's assertion at page 30 of its brief that it could not bear "the imminently ruinous cost" of litigation thousands of miles from New York.

of the Union suit for $9,000,000, Dragor was licensed by the Arizona Corporation Commission to transact business in Arizona (R. 42), and the aforesaid acts performed by Dragor involved a transaction out of which Dragor's liability on the aforesaid note arose. The Agreement of Settlement, paragraph 7, so provides (R. 8, 63).

On April 30, 1964, approximately six months after the aforesaid transaction in Arizona, out of which the liability here sued on arose, Dragor, in an obvious attempt to avoid a suit by Union in the Arizona court, sought to withdraw from the Arizona jurisdiction and filed a withdrawal with the Corporation Commission of the State of Arizona (R. 44). The Arizona Corporation Commission permitted such withdrawal conditioned upon and provided that the "said corporation ceased to exist, *except as to creditors.*" (R. 25, 44) (Emphasis supplied.)

Because of the importance of the certificate of withdrawal a photostat thereof is attached hereto as Appendix "A."

At the time this certificate was issued, Union was a creditor of Dragor and had become a creditor by virtue of a transaction occurring in Arizona, namely, the settlement and dismissal of the aforementioned litigation in the United States District Court in Tucson. (See McConnell Affidavit, R. 63.)

Pursuant to Arizona Revised Statutes, §10-481, appellant was required to designate and thereafter maitain in Arizona a statutory agent for the service of process. In 1953, A.R.S. §10-481 was amended to require all foreign corporations not only to maintain a statutory agent but to file with the Arizona Corporation Commission:

"an irrevocable consent to service of pleadings or

process which shall become effective upon the revocation, annulment or voluntary withdrawal of the license to do business in this state, and which shall provide that actions arising out of or involving business done or transactions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the Commission."

After adoption of the amendment, appellant continued to maintain its license and to transact business in the State of Arizona.

Dragor defaulted in the payment of the moneys due Union on September 30, 1964, and Union thereafter commenced the present action by filing its complaint in the United States District Court for the District of Arizona on December 23, 1964. Copies of the complaint and summons were personally served upon the Arizona Corporation Commission and upon C. T. Corporation, Phoenix, Arizona (R. 12-14). This last company is Dragor's designated statutory agent in Arizona and was such at the time Dragor attempted to withdraw from the jurisdiction of Arizona (R. 71).

In the statement of the case in the Dragor brief, it is claimed that an affidavit filed by Ralph Weiser and containing many arguments and conclusions was binding on the District Court, because not opposed by *seriatim* denials filed by Union. The record does not support Dragor's statement.

In opposition to the motion to quash service of process, Union filed the affidavit of Thomas C. McConnell, which is not denied by Dragor and which sets forth that the certificate issued by the Arizona Corporation Commission contains the express reservation that the said withdrawal was not effective as to Dragor Creditors (R. 44) and that "at the time

of said attempted withdrawal by Ward (Dragor), the plaintiff Union was a creditor of Ward (Dragor) on an obligation created by acts performed in Arizona at a time when Ward (Dragor) was qualified to do business in Arizona, and therefore by the very terms of the affidavit, Ward (Dragor) did not terminate its authority to do business in Arizona as against the plaintiff." (R. 62-63)

After its motion to quash service was overruled and after this court had denied, on March 22, 1965 (R. 169), its petition for a writ of prohibition,[1] Dragor filed an answer and a counterclaim. Subsequently the trial court granted Union's motion for judgment on the pleadings[2] and entered judgment on June 1, 1965 (R. 151). From that judgment the present appeal is taken by Dragor (R. 163-164).

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[1] Once before, Dragor has submitted to this court the jurisdictional argument which it now asserts. In Dragor Shipping Corporation v. The District Court of the United States in and for the District of Arizona, et al., No. 19932, Dragor sought to prohibit the trial judge from proceeding in this matter on the ground that the District Court lacked jurisdiction over the person and that defendant had a counterclaim which it believed included "valid grounds to recover damages from" plaintiff (p. 11, Petitioner's statement of points and authorities, Case No. 19932).

On March 22, 1965, defendant's motion for permission to file a petition for writ of prohibition was submitted for decision and denied by this court.

[2] Dragor has no defense to Union's claim and has made no effort to assert a defense. The lower court granted (R. 184) Union's motion (R. 110) for judgment on the pleadings because the answer failed to assert a defense, and Dragor does not appeal from that ruling.

The motion for judgment on the pleadings was made only with respect to the issues created by the complaint and answer, and judgment was granted under Rule 54(b) (R. 184) with the counterclaim remaining at issue for later trial.

Union has, throughout these proceedings, asserted that the counterclaim was spurious and has at all times been ready and eager to put Dragor to the proof. Trial on the counterclaim was set for December 7, 1965. At that time Dragor failed to appear and its counterclaim was dismissed for lack of prosecution. A transcript of the proceedings on the day of trial is attached as Appendix B. Dragor has now filed a notice of appeal from the judgment of dismissal.

ARGUMENT

I.

THE ARIZONA DISTRICT COURT HAD JURISDICTION OVER THE PERSON OF DRAGOR AND ALSO OVER THE SUBJECT MATTER OF THIS ACTION.

Much of Dragor's argument consists of unsupported assertions. For example, it is stated at p. 14 of its brief that "It appears, without contradiction that the appellant Dragor has not been authorized or qualified to do business in the State of Arizona since April 30, 1964."

The only basis for this statement is a certificate issued by the Arizona Corporation Commission which recited (R. 25) that Dragor had completed "all requirements necessary to permit filing of said withdrawal and thereupon said corporation ceased to exist, *except as to creditors.*" (Emphasis supplied.) (See Appendix A)

Since Union was a creditor at the time and, as we shall show, became a creditor on a transaction taking place in Arizona six months before Dragor attempted to withdraw from Arizona, all of Dragor's argument is beside the point and ignores the fact that under the settlement agreement the obligation upon which this suit was brought did not become effective until the Arizona suits were dismissed. The Agreement of Settlement, although signed by Dragor in New York, called for acts to be performed within the State of Arizona and obviously involved a transaction within the meaning of Arizona Revised Statutes, §10-481(a) (2).

That statute provides that a foreign corporation, before transacting any business in Arizona, shall ap-

point in writing under the hand of its president or other chief officer, attested by its secretary or statutory agent in each county in this state in which the corporation shall carry on business, and file with the Corporation Commission, in the form prescribed by the Commission, "an irrevocable consent to service of pleadings or process which shall become effective upon the revocation, annulment or voluntary withdrawal of the license to do business in this state, and which shall provide that actions *arising out of or involving business done or transactions arising in this state* may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the Commission." (Emphasis supplied.)

Jurisdiction over the subject matter of the action is conceded. Thus, it is admitted in the Dragor brief that there is diversity of citizenship between the parties and that the action involves a sum of money in excess of $10,000, exclusive of interest and costs.

The only question involved here is whether the instant cause of action *involves business done or a transaction arising in the State of Arizona.* Dragor seeks to imply from the citations at pages 15-19 of its brief that there were no transactions in Arizona because the settlement agreement and promissory note were signed in the State of New York. This is a complete *non sequitur* because, as we have already pointed out, the settlement agreement provided for the dismissal of the Arizona suits as a condition to the delivery of the promissory note here in suit.

The cited decisions in the Dragor brief merely express the perfectly obvious proposition that an agreement of compromise and settlement, if fully performed by the parties, supersedes the contract upon

which the original action between the parties was based.

None of them involve a similar fact situation, or support Dragor's claimed lack of jurisdiction argument and hence do not merit discussion in detail. For example, the two Arizona cases cited, *Pacheco v. Delgardo,* 46 Ariz. 401, 52 Pac. 7479, and *Cano v. Arizona Frozen Products Co.,* 38 Ariz. 404, 300 Pac. 953, both involve situations in which a compromise and settlement agreement was held to be invalid because not performed by one of the parties. Because of Dragor's non-performance these cases would rebut Dragor's argument if it were germane.

Defendant does not argue, but attempts to imply that the compromise agreement somehow insulates the defendant from the jurisdiction of the Arizona courts, even though it had done business in Arizona for 17 years, had contracted to perform, and breached, a $7,800,000 contract within the State of Arizona, had a statutory agent there, had engaged in extensive litigation there, and had made an attempted withdrawal from Arizona, subject to the rights of creditors, only after becoming obligated to appellee.

In addition to all this, the settlement agreement perforce was performed in Arizona. In the affidavit sworn to by Thomas C. McConnell and not denied by Dragor (R. 62-63), it is stated: "* * * that the settlement of said suits was only concluded after changes had been made in the settlement proposal by affiant here in Arizona; that affiant refused to permit the said settlement or to permit the dismissal of the said suits in this court until a guarantee of the indebtedness executed by Jakob Isbrandtsen was actually in hand and unless payment of $1,000,000, irrespective of any promissory note or guarantee thereof, was

agreed to by Ward; that the dismissal of the two suits mentioned in the complaint was an act done by Ward in Arizona at a time when both Union and Ward were duly authorized to transact business in the State of Arizona; that the dismissal of the aforesaid suits performed in Arizona constituted the consideration for the aforesaid settlement agreement between Ward and the aforesaid suits in turn concerned transactions which had occurred in Tucson, Arizona, at a time when Ward was authorized to do business in Arizona; * * *:" (R. 63)

(a) Jurisdiction over the person of Dragor was secured pursuant to F.R.C.P. Rule 4(d) (3) and Arizona Revised Statutes §10-481.

Rule 4(d) (3) of the Federal Rules of Civil Procedure provides that in any civil action instituted in a United States District Court, personal jurisdiction over a foreign or domestic corporate defendant may be secured by delivering a copy of the summons and complaint in the action to an *"agent authorized by appointment or by law to receive service of process."* (Emphasis supplied.)

An agent so authorized is one designated by a state corporation law which requires as here a foreign corporation to designate an agent to accept process as a condition to doing business in the state.

In *Ex parte Schollenberger,* 96 U.S. 369, 24 L.Ed. 853 (1878), the Supreme Court held that the designation of an agent by a foreign corporation pursuant to such a state law constituted an actual consent to service of process on such statutory agent. Other cases so holding are *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4, 84 L.Ed. 537 (1939); *Mississippi Public Corp. v. Murphree,* 326 U.S. 438, 90 L.Ed. 185 (1945).

In *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 84 L.Ed. 167 (1939), the Supreme Court held that designation of a statutory agent constituted a waiver of venue as well as a method for securing personal jurisdiction over a foreign corporation. The court said, 308 U.S. 170, in holding such appointment constitutes consent to the jurisdiction of the Federal Court:

> "The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business."

Further, such consent to be sued cannot be revoked by a foreign corporation by surrendering its certificate of authority or ceasing to do business where the obligations sued on arose out of or involved transactions previously occurring within the jurisdiction. See *American Railway Express* cases (273 U.S. 269, 71 L.Ed. 639 (1925) and 273 U.S. 274, 71 L.Ed. 642 (1925) and *Houston Fearless Corp. v. Teter,* 318 F2d 822 (CA 10, 1963).

In *Washington ex rel Bond & G. T. v. Superior Court,* 289 U.S. 361, 77 L.Ed. 1256 (1932), the Supreme Court said:

> "The provision that the liability thus to be served should continue after withdrawal from the state afforded a lawful and constitutional protection of persons who had there transacted business with the appellant." (289 U.S. 364)

As we have heretofore pointed out, Arizona Revised Statutes, §10-481 expressly provides that if the suit involves "transactions arising in this state" then service of process on the Commission, as was done here, constitutes lawful service of process on the

absent corporation. Unless it can be held, as a matter of law, that the dismissal of two law suits in Arizona which constituted the consideration for the note sued on here is not a transaction within the purview of the plain language contained in the statute, then there obviously can be no merit in the Dragor contention.

No decision was cited by Dragor in the court below, and none is cited here, holding that the dismissal of the two Tucson suits under the circumstances of this case did not involve a transaction within the statute. The conclusion of Judge Walsh in the court below that substituted service was proper within the terms of the Arizona Statutes is in accord with other authorities construing comparable statutes in other jurisdictions. See *Giusti v. Pyrotechnic Industries*, 156 F.2d. 351 (C.A. 9. 1946); *Gargac v. Smith-Rowland Co.*, 170 F.2d 177 (C.A. 7, 1948); *Ives v. G. R. Kinney Corporation*, 149 F.Supp. 710-712; *Cohen v. Industrial Finance Corp.*, 44 F.Supp. 489 (S.D.N.Y. 1941). See also *Fletcher Encyclopedia Corporation* §§8676-8677.

The appellant seeks to obscure and avoid the effect of the well established principles of substituted service by a long and involved legal argument that a settlement and compromise constitutes a new contract superseding the original cause of action which was sued on between the parties. Conceding *arguendo* that this is so, this fact cannot negative acts and transactions done within the State of Arizona pursuant to a settlement contract executed in the State of New York.

Further, the fact that the settlement contract in the instant case was signed by Dragor in New York has no significance because it is not the signing of the contract of settlement but the acts done pursuant

theerto that created the obligations sued on; namely, the dismissal of the Arizona suits with prejudice. These were acts done in Arizona, not in New York, and certainly acts done in Arizona do not lose their legal significance merely because they are covered by a contract signed in New York. For example, the subcontract between Union and the joint venture was signed in New York and was to be construed under New York law, but no one would seriously contend that the missile site construction contracts at Davis-Monthan Air Force Base at Tucson were not Arizona transactions. Certainly the holdings in all the cases cited at pages 15 to 19 of the appellant's brief have no bearing whatever on the issue presented here.

Under heading B in the Dragor brief, it is further argued, pp. 19 to 31, that the cause of action sued on arose in the State of New York on September 30, 1964 "upon settlement documents executed and delivered in the State of New York."

Here again Dragor misstates the case and ignores the clear and explicit terms of the settlement contract itself. That contract called for the performance of acts in Arizona which had to be performed by Dragor as a condition to the dismissal of the Arizona law suits. See McConnell affidavit (R. 63). The instrument sued on here is a promissory note, the consideration for which was the dismissal of the Tucson suits. That dismissal was a transaction engaged in by Dragor at a time when it was licensed to do business in Arizone and could not in any case be performed in New York. Nor was the note sued on here a valid obligation under the express terms of the New York contract of settlement until these suits were dismissed with prejudice.

Further, the cause of action sued on in the court

below did not arise exclusively in New York, as argued in the Dragor brief. The note itself provided that it should be construed by Illinois law, but the transaction it grew out of *was the settlement and dismissal of Arizona litigation.* It was only after the suits were dismissed that Union had a valid obligation.

Even though stipulations to dismiss had been executed the cases could only be dismissed by the order of Judge Walsh which could only be entered in Arizona.

The fact that Dragor did not default on its promissory note until after it had attempted to withdraw from Arizona has no bearing under a statute which provides for substituted service on actions "arising out of or involving business done or transactions arising in this state * * *."

However, Dragor places great reliance on this argument and cites a New York case in an attempt to support it.

Boas v. Vernier, 22 App.D.W.2d 561, 257 N.Y.S.2d 487, is the case so cited and is based on Section 302 of New York Civil Practice Law and Rules, which gives jurisdiction over a corporation which . . . "transacts any business within the state."

The New York statute "does not occupy the full jurisdictional field permitted," and is obviously much more restricted in scope than A.R.S. §10-481, but nevertheless appellant cites, *and quotes,* from *Boas* at length to support its assertion that appellant can be sued only in New York because that is where it executed the Agreement of Settlement.

A reading of the quotation from *Boas* at page 29 of appellant's brief seems to support its argument,

but a reading of the decision itself demonstrates that appellant has omitted, without indicating it has done so, a most important clause (257 N.Y.S.2d 487, 489): The actual quotation should read as follows:

> "The complaint seeks the agreed commissions earned by plaintiff as broker and consultant in introducing defendant to certain French underwriters and rendering other services leading to the merger of a French corporation of which defendant was principal stockholder and chief executive officer into a new French corporation. In the absence of any showing that the oral agreement with defendant was negotiated or concluded by defendant in New York, *or that defendant did any other act with respect to the oral agreement in New York,* it cannot be said that the causes of the action arose from an act of defendant in the transaction of business within the State (CPLR 302(a) (1)). The fact that a prior written agreement was historically necesary to the inception of the subsequent oral agreement does not alone, for purposes of the jurisdiction statute, support personal jurisdiction."

Appellant completely omitted the italicized material.

We have found no decisions sustaining Dragor's position, and the law of New York is emphatically to the contrary.

On May 27, 1965, New York's highest appellate court wrote one consolidated opinion in three cases which involve CPLR 302. Two of these cases involve assertion of jurisdiction over a non-domiciliary transacting business in New York, while the third, not relevant here, involved a provision of CPLR 302 relating to tortious conduct within the state.

Longines-Wittnauer Watch Co., Inc. v. Barnes & Reinecke, 261 N.Y.S.2d 8, 22, 209 N.E.2d 80, and *Singer v. Walker,* 261 N.Y.S.2d 8, 24, 209 N.E.2d 80,

were each cases in which the defendant claimed that the contract on which its liability was based was executed in a state other than New York.

In *Singer v. Walker,* the defendant had manufactured a hammer in Illinois, shipped it to New York where it was purchased by plaintiff who was injured while using it in Connecticut. The New York Court of Appeals said (261 N.Y.S.2d 8, 26):

> "We hold that the appellant's activities in this state are sufficient to satisfy the statutory criterion of transaction of business as well as the constitutional requirement of 'minimum contacts'. (See International Shoe Co. v. Washington, 326 U.S. 310, 319-320, 66 S.Ct. 154, 90 L.Ed. 95; supra; McGee v. International Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223, supra.) *For the reasons we gave in rejecting a similar contention in the Longines-Wittnauer case* (supra, 15 N.Y.2d pp. 456-458, 261 N.Y.S.2d 22, 209 N.E.2d 80), *we do not deem it determinative, as urged by the appellant, that the formal execution of its sales contracts may have occurred in Illinois rather than New York.*" (Emphasis supplied.)

This court's latest pronouncement on the point is to the same effect:

> "Moreover, the decisions are clear that even though, in a technical sense, the facts giving rise to the cause of action may have occurred outside of the state, this is not a bar to the assertion of jurisdiction by the state, particularly where there are activities in the state which relate to the cause of action. That we think is certainly the case here. Some cases have held that, if a corporation

> is doing business in the forum state, it is immaterial that the cause of action arose elsewhere. Here, we need not go so far. (Citing cases.) *Mechanical Contractors Ass'n. v. Mechanical Con. A. of N. Cal.,* 342 F.2d 393; 398 (C.A.9, 1965).

What Dragor seeks to obscure is that the transaction here involved took place in Arizona after and not prior to the execution of the settlement documents in the State of New York. Thus, Dragor says at p. 20 of its brief: "Any matter, fact or circumstance occurring prior to the execution of the settlement documents" is "totally irrelevant under the decisions of the United States Supreme Court in determining the constitutional power of a state to subject non-residents to its process." What Dragor refuses to face up to is the fact that the dismissal of the Arizona suits which was the consideration for the note sued on occurred in Arizona at a time subsequent to the execution of the settlement documents in the State of New York.

At page 21 of the Dragor brief, the conclusion of the court in *L. D. Reeder Construction of Arizona v. Higgins Industries,* 265 F.2d. 768, 773, is cited as conclusive and determinative of the question presented here.

There the court said:

> "We note that the acts which have a substantial connection with the state are acts which also have a substantial and, indeed, direct connection with the cause of action sued upon, i.e., the cause of action arises by reason of acts so connected. When this double substantial connection exists, then, in view of the broad language of *McGee v. International Life Ins. Co.,* supra, a single act or transaction may be the basis for jurisdiction over a non-resident defendant."

While that case is no help to Dragor because the non-resident corporation had never qualified to do business, still that language fits the instant case like a glove. The obligation sued on here could not and did not arise until the Arizona cases were dismissed. This was done by Dragor in Arizona at a time when it was authorized to do business as a foreign corporation in Arizona.

The other cases cited at pp. 23 to 31 of the Dragor brief are also clearly distinguishable on their facts. None of them involved a foreign corporation that had qualified to do business in the state whose jurisdiction was attacked. Likewise, none of the defendants had consented to substituted service by exercising the privilege granted of doing business in the state. The distinction is pointed out by Chief Justice Warren in his opinion in *Hanson v. Denckla* cited at page 22 of the Dragor brief.

There he said:

> "Thus there is established as essential some act by which the defendant 'purposefully' seeks the privilege of conducting activities within the forum state and attaining the benefit and protection of its laws. This essential act of the defendant must give rise to or result in a cause of action within that forum state."

In the instant case, Dragor first obtained a certificate of authority from the Arizona Corporation Commission to transact business within the State of Arizona on July 29, 1947. It continuously maintained that license for a period of 17 years, having sought permission to withdraw from Arizona only after it had decided to default on the million dollar note. At all times material here, it has maintained a statutory agent within the state upon whom notices and process might be served.

Dragor's attempt to portray itself as an innocent foreign corporation called before a court in a distant jurisdiction upon a claim based on nothing involving any transaction in Arizona, did not deceive the District Court and we feel sure will likewise not mislead this court. As pointed out in Appellant's Statement of Facts, Dragor initiated litigation against Union in Arizona and insisted that Union's action be removed to Arizona.

(b) Jurisdiction over the person of Dragor was also obtained pursuant to F.R.C.P. Rule 4(d) (7) and Arizona Statutes and Rules.

In addition to serving process on Dragor pursuant to Rule 4(d) (3), providing for service of process upon an agent authorized by appointment or by law, process was served on Dragor's statutory agent pursuant to F.R.C.P. Rule 4(d) (7), which provides that it "is also suficient if the summons and complaint are served in the manner prescribed by the law of the state in which the District Court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

The state law referred to in this Federal Rule includes the provisions of Arizona Rules of Civil Procedure, Rule 4(d) (10) which states that:

> "When a domestic corporation does not have an officer or agent in this state upon whom legal service of process can be made (service shall be effected) by depositing two copies of the summons and complaint in the office of the Corporation Commission which shall be deemed personal service on such corporation."

Arizona Constitution, Article 14, §§5 and 8 also

provide in effect that foreign corporations cannot be made subject to service of process on terms more favorable than domestic corporations. *Arizona Barite Co. v. Western Knapp*, 170 F2 684 (CA 9, 1948).

The state law referred to in F.R.C.P. Rule 4(d) (7) also includes Arizona Revised Statutes, Section 10-484.01(a), which provides:

> "All appointments of statutory agents by a foreign corporation made prior to and which are in effect on June 30, 1958, shall continue in full force and effect until revoked as provided in subsection b."

Subsection b (Arizona Revised Statutes, Section 10-484.01[b]) makes no provision for revocation of the appointment of statutory agents upon surrender of a certificate of authority, but states only that if "the corporation has appointed more than one statutory agent in this state, it may file with the Corporation Commission a certificate * * * designating one of such statutory agents as its statutory agent pursuant to Section 10-481 * * *." The Arizona statute thereby establishes that the designation of a statutory agent is not automatically revoked when a foreign corporation surrenders its certificate of authority to transact business.

The foregoing provisions, made applicable in this action by reason of F.R.C.P. Rule 4(d) (7), thus authorize service of process upon Dragor, either by serving its statutory agent C. T. Corporation or by serving the Arizona Corporation Commission.

This was the conclusion reached in *Arizona Barite Co. v. Western-Knapp Engineering Co.*, 170 F.2d 684 (C.A. 9, 1948), where this court held that a foreign corporation through withdrawal could not immunize

itself from suit on claims arising out of transactions occurring within the State of Arizona prior to such attempted withdrawal. In holding that service on either the last designated statutory agent or on the Arizona Corporation Commission was necessarily valid, this court declared, at page 687:

> "If an Arizona corporation similar to appellee has transacted business in Arizona, an action on any claim arising out of such business can be brought against such corporation in Arizona after it has ceased to transact business in Arizona. If such corporation has a statutory agent in Arizona, service of the summons in such action can be made as provided in §21-305, and such service is valid. If such corporation has in Arizona no officer or agent upon whom legal service of process can be made, service of the summons in such action can be made as provided in §21-314, and such service is valid. These are conditions on which an Arizona corporation similar to appellee is allowed to transact business in Arizona. *Appellee was not and could not be allowed to transact business in Arizona on more favorable conditions.*" (Emphasis supplied.)

Service of process upon Dragor in the present action is in all respects identical with the service of process effected in the *Barite* case (R. 14). It is an exact precedent for sustaining service of process in this action in the manner provided by the State of Arizona law as understood and applied by this Court of Appeals.

The *Barite* principle has since been followed by the Eighth Circuit in *Electrical Equipment Co. v. Hamm,* 217 F.2d. 656 (1954), where that court reversed a judgment dismissing the complaint for want of jurisdiction on the ground that the defendant had

ceased to transact business in the state. The Eight Circuit declared at page 663 of its opinion:

> "Defendant further argues that since process was not served until some nine months after defendant's activities in the state ceased, the defendant was not doing business in Iowa at the time of service of the notice and that service could not be made upon it in June of 1953. This contention is not sound. A foreign corporation which has ceased to do business in a state is still subject to service of process in suits or causes of action which arose out of the business carried on by the defendant in the state."

Barite was also relied upon in *Gibbons & Reed v. Standard Accident Insurance Co.,* 191 F.Supp. 174 (D.C. Utah 1962).

The *Barite* decision is wholly consistent with *International Shoe,* 326 U.S. 310, and with this court's decisions in *Reeder* and *Kourkene* which stand for the proposition that in order to create jurisdiction over a non-resident because of the commission of a single act, that act must be directly connected with the cause of action. In each of those cases the foreign corporation had not qualified to do business in the state in which service of process was had.

In *Reeder,* 265 F.2d 768, 769, this court points out:

> "Here the defendant, never qualified to do business in California, had no paid employees in the state; no office or sample room; no office address; no telephone listing. It accepted the order, placed by McCauley in Louisiana; it shipped the product direct to Arizona. The product was never in California * * *."

In *Kourkene,* 313 F.2d 769, this court comments:

> "There is no evidence that appellee has ever qualified to do business in this state * * *."

CONCLUSION

For 17 years Dragor has secured the benefit and protection of Arizona law, not withdrawing from that jurisdiction until after its default in the performance of its subcontract with Union, out of which the present claim arose, and until it had decided to default on the million dollar promissory note which is the subject matter of this suit. Its withdrawal certificate is limited and merely provides that it is no longer present in Arizona "except as to creditors," and Union clearly qualifies as a creditor entitled to employ substituted service pursuant to the provisions of Arizona law.

We have shown that Dragor's reliance on the "single act" decisions of the Supreme Court is misplaced but even if only a single transaction was here involved those cases are distinguishable because the corporations involved had never been licensed in the forum state.

For the reasons advanced in this brief, we submit that the judgment entered in the court below should be affirmed.

Respectfully submitted,

THOMAS C. McCONNELL
BOYLE, BILBY, THOMPSON AND SHOENHAIR

By H. C. WARNOCK

Attorneys for Appellee

UNION TANK CAR COMPANY
9th Floor, Valley National Building
Tucson, Arizona

CERTIFICATE OF COMPLIANCE

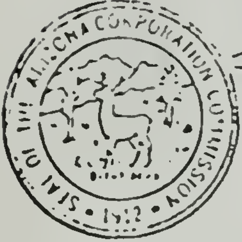
I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

H. C. Warnock, *Attorney*

APPENDIX A

STATE OF ARIZONA

Corporation Commission



To all to Whom these Presents shall Come, Greeting:

I, S. C. CORBITT, SECRETARY OF THE ARIZONA CORPORATION COMMISSION, DO HEREBY CERTIFY THAT the records of the Arizona Corporation Commission show WARD INDUSTRIES CORPORATION, a DELAWARE corporation qualified on the 29th day of July, 1947, and existing under and by virtue of the laws of the State of Arizona, deposited in the office of the Arizona Corporation Commission, a WITHDRAWAL, and did on April 30, 1964, complete all requirements necessary to permit the filing of said Withdrawal and thereupon said corporation ceased to exist, except as to creditors.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE OFFICIAL SEAL OF THE ARIZONA CORPORATION COMMISSION, AT THE CAPITOL, IN THE CITY OF PHOENIX, THIS 30th DAY OF April A. D. 1964

BY S. C. Corbitt SECRETARY.

ASSISTANT SECRETARY

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNION TANK CAR COMPANY,
Plaintiff,

vs.

DRAGOR SHIPPING CORPORATION,
Defendant.

No. Civil
1967

APPEARANCES:

MR. THOMAS McCONNELL and
MESSRS. BOYLE, BILBY, THOMPSON & SHOENHAIR, by
MR. HAROLD C. WARNOCK
For the Plaintiff

NO APPEARANCE ON BEHALF OF THE DEFENDANT

The above-entitled matter came up for trial on the 7th day of December, 1965, at the hour of 9:30 o'clock a.m., at Tucson, Arizona, before the Honorable James A. Walsh, Judge, and the following proceedings were had, to-wit:

(Clerk calls the case.)

MR. WARNOCK: The plaintiff Union Tank Car Company is present and ready to proceed, Your Honor.